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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1818

FORD MOTOR COMPANY, a Delaware Corporation,
Petitioner,

v.

COLONIAL FORD, INC., a Utah Corporation, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Ford Motor Company ("Ford") respectfully petitions for a writ of certiorari to review so much of the judgment of the United States Court of Appeals for the Tenth Circuit, entered in this case on February 5, 1979, as affirmed the decision of the district court granting judgment to Colonial Ford, Inc. ("Colonial") against Ford.

OPINIONS BELOW

The judgment of the court of appeals was entered in accordance with its original opinion in this case, filed May 31, 1978, as clarified by its opinion on rehearing, filed February 5, 1979. The original majority opinion and the separate concurring and dissenting opinion of the court of appeals are reported at 577 F.2d 106. The opinion on rehearing is reported at 592 F.2d 1126. These opinions are reprinted in a separate appendix to this petition. The judgment of the district court was entered without opinion.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1979. On April 19, 1979, Mr. Justice White extended the time to file this petition until June 5, 1979. This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The questions presented by the Tenth Circuit's decision as to this petitioner are:

1. Whether the Automobile Dealer Franchise Act (the "Dealer Franchise Act"), 15 U.S.C. §§ 1221 *et seq.*, prohibits an automobile manufacturer from:

   (i) conditioning its acceptance of a prospective dealer's application for a franchise upon the applicant's commitment to provide physical facilities adequate for effective competition with dealers selling other makes of car, and

   (ii) requiring a dealer who has made such a pre-franchise commitment to fulfill it after the franchise is granted.

2. Whether the Dealer Franchise Act prohibits an automobile manufacturer from refusing to accept a prospective dealer's application for a franchise unless a person possessing desired qualifications of experience and capability is named as a participant in the ownership and management of the prospective dealership.[1]

1. Ford wishes to reserve an additional question for argument in the event that this petition is granted. That question is whether the Tenth Circuit erred in relying in its affirmance on a theory of causation not presented to the jury and not addressed by either party at the trial. The theory was to the effect that Colonial's shortage of working capital, which resulted in its injury, was attributable to Ford's insistence that a person of experience and skill, but little money, be included as a stockholder in Colonial. *See infra*, p. 12.

STATUTORY PROVISIONS INVOLVED

The Dealer Franchise Act, 15 U.S.C. §§ 1221-25 (1976), provides, in pertinent part:

> "[§ 1221] As used in this [Act]–
>
> . . . .
>
> (e) The term 'good faith' shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.
>
> "[§ 1222] An automobile dealer may bring suit against any automobile manufacturer . . . and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer . . . to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided*, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith."

The full text of the Dealer Franchise Act is set forth in a separate appendix to this petition.

STATEMENT OF THE CASE

The Parties

Petitioner Ford is an automobile manufacturer which sells a wide variety of automotive products, including automobiles, through franchised[2] dealers. Colonial was a franchised Ford dealer in Salt Lake City, Utah. Ford Motor Credit Company ("Ford Credit") is a wholly-owned subsidiary of Ford which, among other things, supplies financing to franchised Ford dealers pursuant to floor-plan arrangements.[3] Ford Credit provided such financing to Colonial. An appellant and cross-appellee below, Ford Credit is filing a separate petition for a writ of certiorari. Petitioner Ford does not seek review of the judgment below insofar as it determined claims between Colonial and Ford Credit.

Ford's Relationship with Its Franchised Dealers

Ford does not sell its products directly to consumers, but instead relies almost entirely upon independent franchised dealers to represent it in the marketplace and to compete there with dealers representing Ford's competitors. Ford's own success ultimately depends on the ability of its dealers to compete vigorously and effectively–to penetrate the market and achieve for Ford products a satisfactory volume of sales, to service the Ford products sold, and to maintain the

2. The term "franchise," in its various forms, as used herein, has a meaning based on the definition of "franchise" in Section 1(b) of the Dealer Franchise Act, 15 U.S.C. § 1221(b). (A. 1a; references to "A. " are to pages of the separate appendix to this petition.)

3. Under a floor-plan arrangement, a financial institution lends money to a dealership for the purchase of cars. When a car is sold, the dealership has a duty to remit to the financial institution out of the proceeds of the sale the loan amount attributable to the car sold.

good will of the public toward Ford and its products. (JA 1144-46, 1206-08) [4]

Because Ford's success is thus dependent upon the performance of its franchised dealers, Ford takes pains to assure that each of its dealers will have a strong competitive posture in the marketplace. To this end, Ford includes in its standard franchise agreement provisions which obligate the dealer to maintain adequate physical facilities at an approved location, and to meet various other requirements deemed necessary by Ford to a healthy and competitive operation. (JA 1158-63, 1219-27) A prospective dealer sometimes applies for a franchise before being ready for full compliance with the terms of the standard franchise agreement. Thus, for example, an applicant might not be in a position to provide at the outset fully adequate physical facilities. In such a case, Ford may grant the franchise upon the dealer's express collateral commitment to upgrade his facilities to meet standard requirements within a specified period of time.

In addition, Ford accepts a franchise application only when the principals involved in the ownership and management of the prospective dealership will be capable, in Ford's view, of achieving competitive success. (JA 1144-47, 1206-09) This means that the principals must possess not only sufficient investment capital, but also automobile dealership experience and skill.

A Significant Perspective

The specific facts in this case should be considered from a perspective broader and more generally significant than that of a dispute between automobile manufacturer and dealer. The issues here relate to the ability of automobile manufacturers to compete aggressively with each other,

4. References to "JA " are to pages of the Joint Appendix submitted by the parties on appeal of the district court judgment to the Tenth Circuit.

through franchised dealers, in the consumer marketplace. If the Dealer Franchise Act is applied to shelter those dealers from pro-competitive franchise requirements, the results will be both to inhibit inter-brand competition in the automobile industry and to precipitate substantial changes in automobile franchising detrimental to the interests of independent dealers whom the act was designed to protect.

Events Preceding Ford's Grant of a Franchise to Colonial

In the 1930's, Ford granted C. B. Petty a dealership franchise in Salt Lake City. For thirty years thereafter, the Ford dealership remained in the hands of members of the Petty family. In 1966, the franchise was assigned to a newly-formed corporation named Petty Ford, Inc. At the time Ford approved the assignment, it was represented to Ford that LeGrande L. Belnap ("Belnap"), who had married a member of the Petty family, was acquiring a 51% ownership interest in the dealership. (JA 1637-38)

However, contrary to that representation, Belnap did not at that time actually acquire any ownership interest in the dealership.[5] Nevertheless, as president of Petty Ford, Inc., he claimed the right to direct the dealership's affairs. The Pettys disputed this claim, sought to interfere with Belnap's control of the business, and claimed that Belnap had breached agreements he had made with them.

Having had no previous experience in the operation of an automobile dealership, Belnap relied principally on general

5. Belnap testified at trial that he was not a 51% - owner of Petty Ford, Inc. before June 1969. See Trial Transcript, pp. 447, 450. This Court may wish to take judicial notice of Amended Findings of Fact of the Third District Court of Salt Lake County, State of Utah in *Colonial Ford, Inc. v. Petty*, Civ. No. 199867, filed November 15, 1977. That court found that (i) the 1966 agreement between Belnap and a Petty family partnership under which Belnap was to receive 51% of the dealership assets was never consummated, and (ii) between 1966 and June 1969 the dealership was owned by the Petty family partnership, although its business was controlled and directed by Belnap.

managers for daily operation. Between 1966 and 1969 the business of the dealership steadily deteriorated. Belnap's efforts to control dealership affairs met with continued interference by the Pettys, and they blocked his plans to expand or relocate. Sales volume and profitability declined, and the dealership's market penetration fell from parity with the competing Chevrolet dealer to two-thirds of that Chevrolet dealer's market share. (JA 1637-40)

Ford representatives recommended that management be strengthened and that adequate facilities at a more favorable location be acquired to replace the outmoded ones then in use. Although concurring with these recommendations, Belnap told Ford that they could not be implemented without cooperation from the Pettys, which was not forthcoming.[6] However, Belnap repeatedly assured Ford that he was trying to achieve peace with the Pettys, and that once he did so he would be able to take necessary corrective actions.

Early in 1969, Belnap hired Marshall Pease ("Pease") as general manager. Pease, who was recommended to Belnap by Ford, had been engaged for many years in the management of other Ford dealerships. Under Pease's management, the dealership's sales increased over sales during the same period of the prior year. However, dissension and conflict between Belnap and the Pettys continued unabated, and litigation between them erupted in the Utah courts. Paralyzed by the conflict, the dealership was unable to move toward relocation or the construction of adequate physical facilities. In May 1969, Ford duly notified the dealership that its franchise agreement would be terminated pursuant to its terms. (JA 1637-40, 1137-38)

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6. In a June 1969 letter to Ford (JA 1434-43), Belnap wrote:

> "There has never been a question but what a new facility will increase sales and profitability, and this has been the subject of many letters to the Petty family in an attempt to acquire a new facility at a strategic location."

Upon receipt of Ford's notice of termination, Belnap conferred with Ford representatives to devise a plan for future Ford representation in the Petty Ford locality. Belnap was told that his opportunity to be part of that representation would depend upon his ability to persuade Ford that operation and ownership would be free of dissension.

Belnap consequently planned to buy out the Pettys. Ford representatives told him that, if he did buy out the Pettys, a franchise would be granted only if (1) Pease was designated as the manager of the new dealership and given the opportunity to obtain an equity interest,[7] and (2) the dealership would agree to relocate to new and adequate facilities.

After learning of Ford's conditions, Belnap purchased 51% of the existing dealership, making his first substantial capital investment in the business,[8] and he entered into an agreement, subject to Ford's approval, to purchase the remaining interest of the Pettys. (JA 1444-54)

Immediately after making these arrangements with the Pettys, Belnap proposed that Ford grant a franchise to an entity to be owned wholly by himself. Belnap represented to Ford that (i) it was his intention that Pease would manage operations of the dealership and later receive a 49% equity interest, and (ii) the dealership would begin

7. Belnap testified at trial, and the Court below found, that Ford wanted him to give Pease "absolute control." (A. 18a) It is clear, however, from the terms of the contract which Belnap and Pease subsequently signed, and which Ford accepted, that Ford's concern related to operating management, not "absolute control." The agreement provided that Pease was to receive a 49% minority interest in the dealership, and was to be "in charge of operating the franchise dealership . . . [with] authority to carry out all rights, duties and obligations in connection thereto *with respect to the daily operation*." (JA 1139-41) (Emphasis supplied.) This provision was drafted by Belnap's counsel with the specific purpose of establishing that Pease was not to have "sole control." (JA 397)

8. Belnap's testimony that he had "other money in Petty Ford" prior to the time he purchased his 51% interest (JA 171-72) apparently refers not to an equity investment but to an $85,000 loan. (JA 1448; Trial Transcript, p. 144)

construction of facilities at a new location as soon as possible.[9] (JA 1442)

Ford was willing to replace the Belnap-Petty dealership with a Belnap-Pease dealership. However, Ford informed Belnap that it would approve the buy-out of the Pettys' remaining interest and franchise the new entity only if Belnap first took concrete action to fulfill the conditions which he had agreed to. Pease, unlike Belnap, was a "car man," and Ford declined to enter into the new franchise relationship until Pease became a part-owner of the franchisee. Ford also insisted that the new entity agree that, if franchised, it would acquire adequate physical facilities.

Belnap organized a new corporation, Colonial, to apply for the new Ford franchise. He entered into a management and buy-in agreement with Pease.[10] Colonial then submitted to Ford a prospective dealer application containing a written commitment that Colonial would acquire adequate dealership facilities by July 1, 1970. (JA 1430) Satisfied that both its conditions had been met, Ford accepted Colonial's dealership application. On September 2, 1969, Colonial became a franchised Ford dealer under a franchise agreement to expire September 15, 1971.

Events Following the Grant of a Franchise to Colonial

From the time Colonial commenced operations, Belnap, on its behalf, communicated frequently with Ford representatives regarding acquisition of new dealership facilities. Yet Colonial failed to fulfill its commitment to secure new facilities by July 1, 1970. When Colonial's first

9. According to his testimony at trial, Belnap did not want either of these things to be done, but made the representations in order to induce Ford to accept his proposal. (JA 172-76)

10. Belnap agreed to sell Pease 49% of the stock of Colonial in return for $20,000 in cash and a $200,000 note payable from Pease's share of future profits. It was formally agreed that Pease would manage Colonial's daily operations.

franchise agreement expired in September 1971, Colonial still had only its old facilities. Ford nevertheless entered into a second franchise agreement with Colonial to expire in September 1972, with a warning that it would not again renew unless Colonial took firm steps to relocate to an adequate facility.

In July 1972, Colonial arranged to acquire an appropriate site for relocation, and, in August 1972, was granted a franchise for an indefinite term. Colonial constructed dealership facilities on its newly acquired site, and moved there in the Autumn of 1973.

During the first eight months of 1974, Colonial's annualized net profits, sales volume, and market penetration all increased. However, Colonial was short of working capital to handle its expanded business. Neither Belnap nor Pease added working capital, but instead caused Colonial to violate the terms of its floor-plan financing arrangement and assume an "out-of-trust" position. That is, Colonial failed to remit the money due to its floor-plan creditor, Ford Credit, each time it sold a vehicle; instead, Colonial converted proceeds of such sales to its own use for working capital. (JA 508-09)

Aware of Colonial's working capital shortage, Ford urged Belnap and Pease to add approximately $200,000. But neither of Colonial's owners would add working capital by loan or any other means; instead, they simply continued to use Ford Credit's money to operate the dealership.

In August 1974, Ford Credit learned that the dealership was substantially "out of trust" under the floor-plan arrangement. By September 1974, the condition had worsened, and Ford Credit suspended Colonial's floor-plan credit line. During this period, Belnap took over operating management from Pease, and reacquired Pease's Colonial stock without compensation. Belnap then gave the stock to his wife.

Without a credit line, Colonial failed to obtain sufficient inventory, and its profitability drastically declined. Ford Credit offered to lend Colonial funds for working capital and to reestablish Colonial's credit line, if Belnap and his wife would invest an additional $150,000 in the dealership. The Belnaps failed to do so.[11] Instead, on May 15, 1975, Colonial brought this action against Ford and Ford Credit.

Prior Proceedings

Colonial sued in the United States District Court for the District of Utah, Central Division, alleging violations by Ford of Section 1 of the Sherman Act and of the "good faith" provision of the Dealer Franchise Act.[12] Ford was alleged, among other things, to have wrongfully imposed management and adequate-facilities requirements at the time Colonial was franchised. The jury returned a verdict for Ford on the Sherman Act claim and against Ford in the amount of $210,000 on the Dealer Franchise Act claim.

Ford appealed to the United States Court of Appeals for the Tenth Circuit, urging that the evidence at trial was insufficient to support the verdict. In affirming, the Tenth Circuit held that the verdict was adequately supported by evidence that Ford, as a condition for granting the franchise, required Belnap to agree to sell Pease a 49% interest in Colonial, and required Colonial to commit itself to relocate to new and adequate facilities.[13]

11. A joint personal financial statement submitted by Belnap and his wife to Ford Credit in July 1973 showed their net worth to be in excess of $3,000,000. (JA 1281-82)

12. Other claims included in Colonial's complaint were withdrawn or dismissed before the case was submitted to the jury. With respect to the Dealer Franchise Act claim, the jurisdiction of the district court was invoked under Section 2 of the Act, 15 U.S.C. § 1222. (A.2a)

13. The Court erroneously failed to distinguish between requirements imposed on Belnap and requirements imposed on Colonial. The Dealer Franchise Act applies *only* to relationships between a manufacturer and an "automobile dealer" (a defined term under the Dealer Franchise Act, 15 U.S.C. § 1221 (c), A. 2a), in this case, Colonial. Belnap was never an "automobile dealer."

With respect to the adequate-facilities commitment, the Tenth Circuit's original opinion simply found without support that it was improper for Ford to require and enforce it. With respect to the buy-in requirement, the Court took the position that it was a mere device whereby Ford gave Pease a "free ride" to a 49% interest in a large dealership.[14] According to the opinion, the buy-in caused a shortage of working capital, and the shortage of working capital in turn caused a slowing of operations with attendant loss of profit. The critical link in this chain of causation, attribution of the shortage of working capital to the buy-in, was a creation of the Tenth Circuit, and was without support in the trial record.[15]

Ford petitioned the Tenth Circuit for a rehearing, urging that the Court had erred in applying the Dealer Franchise Act to the imposition of conditions precedent to the grant of a franchise. Granting Ford's petition, the Tenth Circuit delivered a second opinion, "clarifying" its first opinion and again granting judgment in Colonial's favor.

Focusing on the buy-in requirement, the Court emphasized its view that Pease was wrongfully given a "free-ride" by Ford, and ignored Belnap's testimony that Ford

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14. The record is totally inconsistent with the Tenth Circuit's characterization of the buy-in arrangement as a "free ride." Pease obligated himself to pay $220,000, plus interest at 8%, for the stock he received from Belnap. All his stock was pledged to Belnap to secure this obligation. While he owned the stock, Pease used most of the dividends he received to pay interest and principal to Belnap. And, as noted above, Pease received no compensation when Belnap reacquired his stock.

15. The Tenth Circuit's theory was essentially that (i) Pease was incapable financially of providing Colonial with additional working capital when the need arose, and (ii) inferentially, Belnap would not do so because of Pease's part-ownership. (A.12a) However, the opinion did not come to grips with the facts that (i) as soon as Belnap realized the acuteness of the danger to the dealership, he reacquired Pease's stock without compensating Pease, yet still failed to make a capital infusion, and (ii) even while Pease was part-owner, Belnap could have infused working capital by way of a loan without giving Pease any equity interest in the infusion.

required the buy-in because it wanted a "car man" in management.[16] The opinion concluded that Belnap carried out the buy-in requirement only to "protect his investment," despite the fact that Belnap owned no equity interest in the dealership until *after* Ford told him that the buy-in would be required.[17] Moreover, the Court did not reconcile the fact that the buy-in was completed *before* the franchise was granted with the fact that the Dealer Franchise Act covers only *post*-franchise conduct by an automobile manufacturer. No post-franchise conduct of Ford in connection with the buy-in was even suggested in the opinion.

REASONS FOR GRANTING THE WRIT

This Court has never granted certiorari in a Dealer Franchise Act case, and has never rendered a decision interpreting that statute. This petition should be granted because the Tenth Circuit's decision, in conflict with decisions in three other circuits, places an interpretation on the Dealer Franchise Act that would have a significant adverse effect on competition and franchising in the automobile industry.

First, the Tenth Circuit interpreted the Dealer Franchise Act so as to prevent an automobile manufacturer from requiring its franchised dealers to provide physical facilities adequate for effective competition with dealers in other makes of car. This interpretation sets the Dealer

16. The equity interest obtained by Pease through the buy-in gave him an incentive to remain with the dealership and make it a success. As Pease told Ford, he had been unable to obtain an equity interest in the dealership he had managed previously, and he was interested in working for Belnap only if he could obtain such an interest. (JA 1454) Thus, the conclusion of the Tenth Circuit that Ford had no "legitimate interest" in the "ownership" (as opposed to "management") of Colonial (A. 19a) is inconsistent with the record.

17. Belnap testified that (i) Ford representatives told him in May or June 1969 of Ford's buy-in requirement, and (ii) after this, at the very *end* of June 1969, Belnap *first* made an equity investment in the Petty Ford dealership. (JA 165-76; Trial Transcript, pp. 447, 450)

Franchise Act at cross-purposes with the basic pro-competitive philosophy of the antitrust laws, as recently elucidated by this Court in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) ("*Sylvania*"). The decision is also in direct conflict with the decisions of three other circuits, which have interpreted the Dealer Franchise Act to permit such pro-competitive requirements.

Second, the Tenth Circuit applied the Dealer Franchise Act to prohibit an automobile manufacturer from selecting its dealers in a manner calculated to maximize competition in the marketplace. It did this by holding Ford liable for insisting that ownership and management of a prospective dealer, Colonial, include a person possessing qualifications of experience and skill believed by Ford to be essential for effective competition by the franchisee.

Third, the Tenth Circuit's interpretation of the Dealer Franchise Act in the respects described above could well cause automobile manufacturers to adopt policies and practices that would have detrimental effects on independent businessmen.

I.

THE DECISION OF THE TENTH CIRCUIT WOULD HAVE AN ADVERSE EFFECT ON COMPETITION AND FRANCHISING IN THE AUTOMOBILE INDUSTRY.

Adequate Facilities

The Tenth Circuit held that the Dealer Franchise Act, a "supplement" to the antitrust laws,[18] paradoxically prohibits an automobile manufacturer from enforcing a contractual commitment by a dealer to provide physical

18. The official title of the Dealer Franchise Act is "An Act to supplement the antitrust laws of the United States . . . ." Pub. L. No. 1026, c. 1038, 70 Stat. 1125 (1956) (A. 1a). *See also* 15 U.S.C. § 1224. (A. 3a)

facilities deemed adequate for effective competition against dealers in other makes of car.[19]

That holding is philosophically antagonistic to the competitive objectives of the antitrust laws as recently elucidated by this Court in *Sylvania*. In that case, this Court expressly recognized the vital importance of dealer strength in the arena of inter-brand competition, which was also recognized to be the primary antitrust objective. In *Sylvania*, it was held that even substantial restrictions on dealers' *intra-brand* competitive efforts might be justified where those restrictions aided competitive effort in the *inter-brand* market. Thus, this Court said:

> "Established manufacturers can use them [vertical restrictions] *to induce retailers* to engage in promotional activities or *to provide service and repair facilities* necessary to the efficient marketing of their products. Service and repair are vital for many products, such as *automobiles* and major household appliances. The availability and quality of such services affect a manufacturer's goodwill and the *competitiveness* of his product." 433 U.S. at 55. (Emphasis supplied.)

The inconsistency between the Tenth Circuit's holding and the philosophy reflected in *Sylvania* is readily apparent. Here, the Tenth Circuit has held *impermissible* enforcement of a *contractual* requirement that the dealer provide facilities adequate for competitive marketing of the manufacturer's products.[20] In *Sylvania*, this Court held that a dealer might *properly* be induced to provide such

19. The Court below found that Ford's requirement, as a condition for granting the franchise, that the "place of business be changed to a new location with new facilities" was one of two examples of violation of the Dealer Franchise Act that the jury was properly permitted to find. (A. 10a)

20. The relationship between the required facilities and the dealer's competitive effectiveness is empirically supported. After Colonial moved to its new facilities in 1973, its share of the automobile market in the geographic area it served increased substantially. (JA 1459-73)

facilities even by imposition on dealers of *vertical restrictions*.

It is clearly fundamental to an automobile manufacturer's ability to compete and to survive economically that it be permitted to require its dealers to provide the physical means to represent the automobile manufacturer in the marketplace effectively and competitively. In that context, the Tenth Circuit's decision poses a serious threat to automobile manufacturers. Actions taken by them to meet the threat could have detrimental effects on many independent businessmen.

First, automobile manufacturers might eschew franchise relationships with dealers who were not able immediately to provide adequate physical facilities. There would be reluctance to rely upon a commitment that such facilities would be provided after commencement of the franchise relationship, lest later enforcement of the commitment be deemed a violation of the Dealer Franchise Act. A potential dealer of ability and experience, who nevertheless does not have adequate facilities in place in the franchise locality, could be disqualified or at least disadvantaged in his quest for a franchise.

Second, prohibiting automobile manufacturers from enforcing adequate-facilities requirements would give them incentive to take steps toward vertical integration, at least in key locations, eliminating *pro tanto* the role of independent businessmen. This Court's observation on such a possibility in the parallel context of *Sylvania* is equally applicable here:

> "We also note that *per se* rules in this area may work to the ultimate detriment of the small businessmen who operate as franchisees. To the extent that a *per se* rule prevents a firm from using the franchise system to achieve efficiencies that it perceives as important to its successful operation, the rule creates an incentive for vertical integration

into the distribution system, thereby eliminating to that extent the role of independent businessmen." 433 U.S. at 57, n.26.[21]

Selection of Dealers

The Tenth Circuit cited the requirement that Pease be permitted to buy into the dealership as one of two examples of requirements which the jury could have found to evidence a violation of the statutory duty of "good faith." (A. 10a) The Court found a violation of the Dealer Franchise Act in imposing this requirement because it "carried over" into the post-franchise period. (A. 10a, 20a)

The buy-in requirement "carried over" only in the sense that Colonial's corporate structure continued during the franchise period. However, the buy-in requirement was completely fulfilled before the franchise was granted, and was in its essence an exercise of Ford's right to select a franchisee with whom it wished to deal. That right is critical to a manufacturer's ability to insure that its dealers will be qualified to compete vigorously and effectively with dealers representing the manufacturer's competitors.

In the present case, the record shows that Ford believed, when it granted the franchise to Colonial, that Belnap possessed the financial resources, but not the managerial experience and skill, to operate a competitive dealership. Ford's insistence on equity participation by a manager of proven competence and experience reflected its concern that

21. Mr. Justice Stewart, in his separate opinion in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 387 (1967), expressed a similar concern:

> "Indiscriminate invalidation of franchising arrangements would eliminate their creative contributions to competition and force 'suppliers to abandon franchising and integrate forward to the detriment of small business. . . .' *Standard Oil Co.* v. *United States*, 337 U.S. 293, 315 (separate opinion of Mr. Justice Douglas)." (Footnote omitted.)

its new dealer be capable of reestablishing Ford's competitive position in the dealership locality.[22]

This Court has long upheld the right of a manufacturer freely to select its representatives in the marketplace. As stated in *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), there is a

> "long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."

As in *Colgate*, moreover, this right exists even when a manufacturer uses his freedom to select dealers as a means of furthering such a non-competitive objective as resale price maintenance. In *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960), it was explained that a unilateral refusal to do business with a dealer for an anti-competitive purpose is lawful under *Colgate* because the "countervailing consideration" of allowing a manufacturer freedom to select its dealers outweighs even anti-competitive effects.

Here, no anti-competitive effect of Ford's requirement of equity participation by Pease was even postulated by the Tenth Circuit. And that Court totally ignored Ford's objective to involve a "car man" in the dealership and thus *enhance* competition in the marketplace. As the Ninth Circuit has held,

> "a manufacturer may discontinue a relationship, or refuse to open a new relationship for business reasons which are sufficient to the manufacturer . . . . Where . . . a supplier seeks no more than a better equipped and more aggressive distributor for his product, *his conduct may in fact be more beneficial than detrimental to competition* . . . ."

22. Ford's manner of dealing with Belnap's franchise application, in this respect, was essentially the same as Ford's manner of dealing with the franchise application of any principal investor who lacks automobile dealership experience.

> *Ricchetti v. Meister Brau, Inc.*, 431 F.2d 1211 at 1214-15 (1970), *cert. denied*, 401 U.S. 939 (1971). (Emphasis supplied.)

Similarly, in *Pierce Ford Sales, Inc. v. Ford Motor Co.*, 299 F.2d 425, 430, *cert. denied*, 371 U.S. 829 (1962), the Second Circuit construed the Dealer Franchise Act to permit an automobile manufacturer to reject franchise applicants lacking qualifications believed by the manufacturer to be necessary for competitive success:

> "[A] manufacturer may refuse to accept a person as a dealer because of an honest belief that the prospective dealer lacks either the ability or the financial resources to be a successful dealer."

The Dealer Franchise Act was not intended to govern the process of dealer selection; that is evident not only from its terms,[23] but also from the remedial purpose which it was designed to serve. As this Court noted in *New Motor Vehicle Board v. Orrin W. Fox Co.*, 99 S. Ct. 403, 407, n.4 (1978), the Dealer Franchise Act was enacted to protect from coercion a dealer who had *already* entered a franchise relationship with a manufacturer, and consequently was seen by legislators as an "economic captive" of the manufacturer.

No comparable legislative purpose is implicated in the process of dealer selection. Application of the Dealer Franchise Act to curtail the freedom of a manufacturer to require participation of a qualified principal in a prospective dealership would inhibit procurement of a competitive dealer body without promoting any policy underlying the statute.

Nor would such application of the Dealer Franchise Act benefit the independent businessmen seeking franchises.

23. By its terms, the Dealer Franchise Act imposes an obligation of good faith "in performing or complying with," or in terminating or failing to renew, an existing franchise. 15 U.S.C § 1222. (A. 2a)

Automobile manufacturers would be deterred from encouraging would-be investors, lacking automobile dealership experience, to obtain partners who could supply that qualification. Since such an initiative might subject the manufacturer to a Dealer Franchise Act claim similar to the one asserted here, the franchise applications of such inexperienced would-be investors would simply be rejected to avoid the risk.

II.

THE DECISION OF THE TENTH CIRCUIT IS IN DIRECT CONFLICT WITH DECISIONS IN THREE OTHER CIRCUITS.

The decision of the Tenth Circuit is not merely, as shown above, in conflict with the philosophy of *Sylvania* and with the objectives of antitrust, but it is also in conflict with decisions in three other circuits. Those three circuits decided the question of the propriety of an adequate-facilities requirement in a manner that will enhance, rather than curtail, competitive activity.

THE TENTH CIRCUIT DECISION

Colonial made a contractual commitment to Ford, as a condition of the franchise grant, that it would relocate to adequate new facilities. The Tenth Circuit held that requiring the commitment "before a franchise would be given", and subsequently enforcing it, were sufficient to "show a violation of the Dealer Act." (A. 10a)

While the Court below correctly noted that the jury was instructed that Ford could properly impose "reasonable standards as to facilities" (A. 11a), there is no suggestion in its opinion that the jury could have found that Ford had imposed unreasonable standards.[24]

24. The Court below noted that the jury could have found a "causal connection" between the "size or cost of the new location and facilities" and the "liquidity problem." (A. 13a) However, such a causal relationship would have existed whether the "standards as to facilities" were

Thus, the Tenth Circuit held that the Dealer Franchise Act can be applied to prohibit an automobile manufacturer from reasonably enforcing a pre-franchise contractual commitment to provide adequate facilities. This holding is in direct conflict with the holdings in three other circuits.[25]

CONFLICTING DECISIONS IN OTHER CIRCUITS

Fifth Circuit

In *Woodard v. General Motors Corp.*, 298 F.2d 121 (5th Cir.), *cert. denied*, 369 U.S. 887 (1962),[26] a dealer charged General Motors with violating the Dealer Franchise Act by terminating his Chevrolet franchise. The franchise agreement had included an adequate-facilities provision. It was understood at the time the franchise was granted that General Motors regarded as inadequate the facilities with which the dealer would begin operations. The dealer, however, promised that he would relocate at an early date. The dealer failed to relocate; General Motors pressed the dealer to keep his promise without success; and General Motors gave notice of termination. The dealer sued.

The Fifth Circuit affirmed summary judgment for General Motors, upholding the legality of the requirement of an adequate-facilities commitment as a condition for granting a franchise:

> "An automobile manufacturer is not precluded by the [Dealer Franchise] Act from including in its contracts with dealers . . . requirements that dealers shall provide product representation commensurate

"reasonable" or not, if the owners refused, as they did here, to add needed working capital.

25. The holding appears to conflict even with a prior holding in the Tenth Circuit. *See Salco Corp. v. General Motors Corp., Buick Motor Div.*, 517 F.2d 567 (1975).

26. *See Victory Motors of Savannah, Inc. v. Chrysler Motors Corp.*, 357 F.2d 429 (1966); *Kestenbaum v. Falstaff Brewing Corp.*, 575 F.2d 564, 571-73 (1978), *cert. denied*, 99 S. Ct. 1218 (1979).

> with the good will attached to its trade name and facilitate the proper sale and servicing of its motor vehicles. The manufacturer is entitled to bargain for the protection of its good name, to provide for the trade acceptance of its wares, *and to have a reasonable expectation that those who are marketing its cars have the facilities for coping with the sales efforts of those who are dealing in the products of competitors.*" 298 F.2d at 128. (Emphasis supplied.)[27]

The Fifth Circuit also clearly held that under the Dealer Franchise Act an automobile manufacturer may properly insist after the franchise is granted that the commitment be fulfilled. The Fifth Circuit said, in words peculiarly applicable to the circumstances here:

> "It was known by the appellants prior to the execution and delivery of the agreement that the appellee regarded the Stonewall Street premises as unsuitable and inadequate. Before, at the time of, and subsequent to the execution and delivery of the contract the appellants promised to procure a satisfactory and adequate location for the Chevrolet dealership. *The efforts of the appellee in seeking compliance with these undertakings were consistent with and in the enforcement of the contractual obligations of the appellants.*" 298 F.2d at 129. (Emphasis supplied.)

Seventh Circuit

In *Ed Houser Enterprises, Inc. v. General Motors Corp.*, [1979-1] Trade Cas. (CCH) ¶ 62,505 (7th Cir. 1978), the dealer alleged that General Motors had violated the Dealer Franchise Act by threatening non-renewal of its franchise

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27. It may be noted that the Tenth Circuit did not even address the question of competitive "coping" or the relationship between an adequate-facilities requirement and inter-brand competition.

if it failed to construct new dealership facilities. The Seventh Circuit affirmed summary judgment in favor of General Motors.

The circumstances in *Ed Houser* were strikingly similar to those in this case. Mr. Ed Houser was an officer of a General Motors dealership having physical facilities considered unsatisfactory by General Motors. Mr. Houser proposed to General Motors that his company, Ed Houser Enterprises, Inc., replace the existing dealership. General Motors agreed, and entered into a standard General Motors franchise agreement with the new dealer. The new franchise was granted upon the express collateral agreement that the franchise would not be renewed unless the dealer constructed new, adequate dealership facilities within a specified time.

The Court upheld General Motors' right under the Dealer Franchise Act to enforce the pre-franchise commitment:

> "It cannot be said . . . that the defendant threatened or coerced or intimidated the plaintiff to provide new facilities when the basis of the agreement required such a commitment on the part of the plaintiff." [1979-1] Trade Cas. ¶62,505 at 76,937.

The Court cited *Woodard* for the proposition that

> "an automobile manufacturer is not precluded by the [Dealer Franchise] Act from requiring its dealers, pursuant to the contract between them, to provide facilities . . . *adequate to compete with dealers in products of the manufacturer's competitors.*" *Id.* (Emphasis supplied.)

Third Circuit

The Third Circuit has reached the same result. In *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963),[28] a dealer sued Ford for violating the Dealer Franchise Act, claiming that Ford had improperly terminated the dealer's franchise for failure to fulfill a commitment to maintain adequate facilities. Despite a jury verdict for the dealer, the district court entered judgment for Ford. The Third Circuit affirmed.

As in the present case, the dealer in *Milos* applied for a Ford franchise at a time when it did not yet have physical facilities that met Ford's standards. While the application was pending, the then prospective dealer wrote Ford, acknowledging that the existing facilities were inadequate, and agreeing to secure suitable facilities within two years if the franchise were granted. Shortly after this commitment was received, Ford granted the franchise.

Following the grant of the franchise, the dealer failed to obtain new facilities. Ford pressed the dealer to do so but the dealer resisted, and Ford finally terminated the franchise. The Court held that Ford acted properly in pressing the dealer to expand its facilities, and rejected the dealer's claim that the Dealer Franchise Act precluded enforcement of the adequate-facilities commitment:

> "With respect to the adequacy of plaintiff's facilities, it will be recalled that [plaintiff] himself acknowledged this deficiency and the first franchise was granted only after he promised to remedy it within two years. Thus . . . it is a case of one party to a contract freely entered into requiring the other party to perform. *An attempt to enforce an unambiguous contractual obligation, under these circumstances, can hardly be said to constitute coercion or intimidation.*" 317 F.2d at 717-18 (Emphasis supplied.)

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28. *See Globe Motors, Inc. v. Studebaker - Packard Corp., 328 F.2d 645 (1964); Garvin v. American Motors Sales Corp.*, 318 F.2d 518 (1963); *Kaiser v. General Motors Corp. (Pontiac Motor Div.)*, 396 F. Supp. 33 (E.D. Pa. 1975), *aff'd mem.*, 530 F.2d 964 (1976).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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Respectfully submitted,

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